

The Honorable Thomas S. Zilly

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

STRIKE 3 HOLDINGS, LLC, a
Delaware corporation,

Plaintiff,

v.

JOHN DOE, subscriber assigned IP
address 73.225.38.130,

Defendant.

No. 2:17-cv-01731-TSZ

**DECLARATION OF JESSICA
FERNANDEZ IN SUPPORT OF
PLAINTIFF/COUNTER-
DEFENDANT'S RESPONSE TO
MOTION TO SEAL**

Noted on Motion Calendar:
July 12, 2019

I, Jessica Fernandez, do hereby state and declare as follows:

1. I am over the age of 18 and am otherwise competent to make this declaration.
2. This declaration is based on my personal knowledge and, if called upon to do so, I will testify that the facts stated herein are true and accurate.
3. I am employed as an in-house attorney for Plaintiff/Counter-Defendant Strike 3 Holdings, LLC ("Strike 3" or "Plaintiff").
4. To my knowledge, only a limited number of people have access to the sensitive financial information of this company.

5. I have reviewed the unredacted copies of Defendant's Supplemental Response to Motion for Summary Judgment (Dkt. No. 148)¹, Defendant's Excerpts from my April 12, 2019 Deposition (Dkt. No. 150-5),² and Defendant's Excerpts from the April 11, 2019 deposition transcript of Greg Lansky (Dkt. No. 150-12).³

6. Defendant's Excerpts from the April 11, 2019 deposition transcript of Greg Lansky contain information relating to Strike 3's revenue from subscriptions, licensing fees, and DVD sales. It also contains the total number of subscribers to Strike 3's websites. Defendant's Excerpts from my April 12, 2019 Deposition contain information about the gross and net recovery from Strike 3's legal matters.

7. Strike 3 does not disclose this information to its competitors or the general public. All employees who obtain such revenue and proceeds information are under a duty of confidentiality and would not share this information other than with those who need to know it for a business purpose within the company. Public disclosure of this information could harm Strike 3 by permitting competitors to know Strike 3's revenue and net proceeds and basing, in part, competitive business decisions upon that information.

8. Defendant's Supplemental Response to Motion for Summary Judgment contains: (1) Strike 3's total number of subscribers; (2) Strike 3's total yearly revenues from subscriptions, licensing fees, and DVD sales; and (3) gross and net recovery from Strike 3's legal matters.

9. Strike 3 maintains all of the information listed in the immediately preceding paragraph in confidence.

10. Disclosure of this information could harm Strike 3's competitive standing.

11. In short, Strike 3 derives economic benefit from keeping this type of

¹ This document is also listed as Exhibit 1 to Dkt. No. 147.

² This document is also listed as Exhibit 2 to Dkt. No. 147.

³ This document is also listed as Exhibit 3 to Dkt. No. 147.

1 information confidential.

2 12. Although Plaintiff has made public portions of its own excerpts of Mr.
3 Lansky's deposition transcript and my deposition transcript, which overlap with portions
4 used in Defendant's exhibits, Plaintiff respectfully submits Exhibits "A," "B" and "C" to
5 this declaration, which are redacted public versions of Defendant's Supplemental Response,
6 Excerpts of Jessica Fernandez Deposition, and Excerpts of Greg Lansky, respectively.

7 I hereby declare under penalty of perjury under the laws of the United States of
8 America that the foregoing is true and correct.

9 Executed on this 3rd day of July, 2019, at Los Angeles, California.

10 
11 Jessica Fernandez

CERTIFICATE OF SERVICE

I, Jeremy Roller, hereby certify that on July 5, 2019, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of filing to the following parties:

Adrienne D. McEntee, WSBA #34061
Beth E. Terrell, WSBA #26759
Email: bterrell@terrellmarshall.com
amcentee@terrellmarshall.com
936 North 34th Street, Suite 300
Seattle, Washington 98103-8869
Telephone: (206) 816-6603
Facsimile: (206) 319-5450

J. Curtis Edmondson, WSBA #43795
Email: jcedmondson@edmolaw.com
EDMONDSON IP LAW
399 NE John Olsen Avenue Hillsboro
Oregon 97124
Telephone: (503) 336-3749

Attorneys for Defendant

DATED this 5th day of July 2019 at Seattle, Washington.

/s/ Jeremy Roller
Jeremy Roller

EXHIBIT A

THE HONORABLE THOMAS S. ZILLY

U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

STRIKE 3 HOLDINGS, LLC, a Delaware
corporation,

Plaintiff,

vs.

JOHN DOE, subscriber assigned IP
address 73.225.38.130,

Defendant.

JOHN DOE subscriber assigned IP
address 73.225.38.130,

Counterclaimant,

vs.

STRIKE 3 HOLDINGS, LLC,

Counterdefendant.

NO. 2:17-cv-01731-TSZ

**DEFENDANT'S SUPPLEMENTAL
RESPONSE TO PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT**

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I. INTRODUCTION

Strike 3 accused John Doe of downloading dozens of Strike 3’s pornographic films. Strike 3’s allegations minced no words. Strike 3 did not suggest that Doe “might” be responsible for infringement. Strike 3 did not indicate that the facts led to a “reasonable inference” that Doe was guilty. Strike 3 did not hedge any risk whatsoever that someone else could have infringed. In no uncertain terms, Strike 3 alleged: “Defendant downloaded, copied, and distributed a complete copy of Plaintiff’s Works without authorization.” ECF 1 ¶ 27.

Strike 3 then doubled down, leading the Court to believe that the infringement—for which they said Doe alone was responsible—meant that Strike 3 should be allowed to engage in early discovery to learn Doe’s identity so that Doe could be formally named in the amended complaint. Strike 3’s motion omitted material facts. First, Strike 3 did not tell the Court that they *could not have known* that Doe was responsible for infringement. Second, Strike 3 did not inform the Court that the technology they used to investigate Doe *could never prove* that anyone downloaded complete copies of Strike 3’s works. Finally, Strike 3 did not disclose that they intended to use the discovery process as a fishing expedition directed toward third parties.

These facts have led other courts around the country to conclude that Strike 3 is not entitled to early discovery. Had Strike 3 been candid here, the Court may not have granted Strike 3’s *ex parte* request. Strike 3’s decision to hide the ball from the Court not only calls into question their duties under Rule 11, it supports liability for the tort of abuse of process. As argued here, and in Doe’s prior submission, genuine issues of material fact support Doe’s abuse of process counterclaim. Summary judgment should be denied.

II. ADDITIONAL FACTS

A. Strike 3’s complaint accused John Doe alone of infringement.

The first paragraph of Strike 3’s complaint takes direct aim at John Doe, the subscriber assigned IP address 73.225.38.130: “This is a case about the ongoing and wholesale copyright infringement of Plaintiff’s motion pictures by Defendant...” ECF 1 ¶ 1. Strike 3’s

1 representation that Doe was their sole target, and the only person who could have been
 2 responsible for alleged infringement, could not be clearer from the complaint's allegations. The
 3 relevant allegations, which accuse Doe of egregious conduct, include:

- 4 4. Defendant, is in a word, stealing these works on a grand
 5 scale. Using the BitTorrent protocol, Defendant is
 6 committing rampant and wholesale copyright infringement
 7 by downloading Strike 3's motion pictures as well as
 8 distributing them to others. Defendant did not infringe just
 9 one or two of Strike 3's motion pictures, but has been
 10 recorded infringing 80 movies over an extended period of
 11 time.
- 12 5. Defendant attempted to hide his theft by infringing
 13 Plaintiff's content anonymously....
- 14 23. Defendant used the BitTorrent file network to illegally
 15 download and distribute Plaintiff's copyrighted motion
 16 pictures.
- 17 27. Defendant downloaded, copied, and distributed a complete
 18 copy of Plaintiff's Works without authorization.

19 ECF ¶ 1.

20 **B. Strike 3 moved to subpoena Doe's internet provider based on the same allegations.**

21 Strike 3 made similar allegations in support of their *ex parte* request for early discovery.
 22 ECF 4. In their motion, Strike 3 represented: "Not only does Defendant download these movies
 23 through the BitTorrent protocol, Defendant distributes these movies to others, encouraging
 24 others to steal Strike 3's motion pictures." *Id.* at 8-9. Strike 3 continued, "Defendant's
 25 infringement is consistent, ongoing, and highly damaging." *Id.* at 9. "[B]ut for the Doe
 26 Defendant directing his or her BitTorrent client to download the torrent file, the alleged
 27 infringement would not have occurred." *Id.* at 10.

Strike 3's motion depended entirely on the strength and credibility of the
 "investigation" conducted by their German investigator, IPP. To support their motion for early
 discovery, Strike 3 submitted declarations designed to bolster IPP's work. These same
 witnesses have submitted nearly identical declarations in thousands of other cases, including in

1 this district. ECF 79 at 8, 11. Each suggests that Strike 3, rather than IPP, directed the
 2 investigation. For example, Strike 3 submitted a declaration from John Pasquale, who testified
 3 that he tied the alleged infringement to Doe’s IP address based on information he received from
 4 IPP. ECF 4-4 ¶ 9. But in his deposition, Mr. Pasquale admitted that he only assumed IPP was
 5 the source of the information, and in fact, never communicated with IPP. Ex. 1 (Pasquale Dep.)
 6 at 23:1-16, 41:10-21, 45:11-45:3.¹

7 Similar problems surround Susan Stalzer. In her declaration, Ms. Stalzer testified that
 8 “IPP provided me with the infringing motion picture file for each of the file hashes listed on
 9 Exhibit A to Strike 3’s Complaint.” ECF 4-5 ¶ 8. But when deposed, she explained that it was
 10 Strike 3—not IPP—who provided her the “verification tool” she needed for her role in the
 11 investigation. Ex. 2 (Stalzer Dep.) at 36:24-37:17, 110:14-16. Ms. Stalzer’s contact at Strike 3
 12 is with someone named “Sud.” *Id.* Both witnesses conceded they did not draft their declarations
 13 and do not know who authored them. Ex. 1 at 22:9-23:2; Ex. 2 at 104:17-25.

14 The name “Sud” or “Sid” also came up in other depositions. Tobias Fieser testified that
 15 when he receives requests for information from Strike 3, those requests often come from Sid.
 16 Ex. 3 (Fieser Dep.) at 172:18-173:4, 233:11-25. And Strike 3’s corporate representative, Jessica
 17 Fernandez, testified that “Sid” does work for GMS and wrote the software that Strike 3 uses to
 18 decide who the company should sue. Ex. 4 (Fernandez Dep.) at 161:2-16. Strike 3 initially
 19 agreed to work with Doe to depose “Sid/Sud” about his work but has since refused to produce
 20 any documents that would provide Doe any information about Sid/Sud’s role at Strike 3. Ex. 6
 21 (Plaintiff’s Objections and Responses to Defendant’s Fourth Set of Requests for Production).

22 **C. Strike 3’s motion for early discovery failed to disclose material facts to the Court.**

23 Strike 3 was recently summoned to court in Camden, New Jersey for a May 31, 2019
 24 hearing before Judge Joel Schneider. There, Strike 3 was asked to address questions about
 25 allegations in another form complaint involving identical allegations against a different
 26

27 ¹ All exhibits are attached to the McEntee Declaration unless otherwise noted.

1 defendant. Many of Judge Schneider’s questions “explore[d] Rule 11 concerns” regarding
 2 specific allegations in the complaint. Judge Schneider’s primary focus was on paragraph 27,
 3 which alleges, just as it does here, that “Defendant downloaded, copied, and distributed a
 4 complete copy of each of plaintiff’s works without authorization.” Ex. 7 (Hearing Transcript) at
 5 14:4-7, 24:21-33:11.

6 Strike 3 initially tried to skirt around the plain language of paragraph 27, representing
 7 that what they are really “saying in the initial Complaint [is] that the subscriber is going to get
 8 us to that infringer.” *Id.* at 24:8-15. But when Judge Schneider pushed back—“No, that’s not
 9 what you say, counsel. That’s not what you say”—Strike 3’s attorneys acknowledged that
 10 Strike 3 “may need to look at our Complaint and perhaps tweak what we’re saying.” *Id.* Strike
 11 3 was forced to admit that when they file a complaint, the only evidence they have that a Doe
 12 defendant has infringed is his or her connection to an IP address. “Strike 3 doesn’t know who
 13 the subscriber is...” *Id.* at 22:7-15. They “only know an IP address.” *Id.*

14 Strike 3’s position is that while they have an “obligation before we file our Amended
 15 Complaint under Rule 11 to make sure that we have more [than a connection to an IP address],”
 16 they need not do so in their original complaint. *Id.* at 32:8-9. In response to Judge Schneider’s
 17 suggestion that Strike 3 had “skipped a step,” Strike 3 relied on the Ninth Circuit’s decision in
 18 *Cobbler Nevada, LLC v. Gonzales*, 901 F.3d 1142, 1145 (9th Cir. 2018). Ex. 7 at 32:17-33:11.
 19 But the *Cobbler Nevada* decision held the opposite—that a Doe’s “status as the registered
 20 subscriber of an infringing IP address, standing alone, does not create a reasonable inference
 21 that he is also the infringer.” *Cobbler Nevada*, 901 F.3d at 1145.

22 Strike 3’s admission that paragraph 27 of their complaint may be inaccurate is material.
 23 In the initial response to summary judgment, Doe submitted testimony by Dr. Eric Fruits, in
 24 which Dr. Fruits opined that Strike 3 had only a 36% chance of suing the right person. ECF 81
 25 ¶ 34. Strike 3’s recent representations in Camden add support to Dr. Fruits’ opinion. After
 26 Strike 3 obtains a subscriber’s identity through early discovery, they decide “not to move
 27

1 forward” “roughly about 35 to 40 percent of the time...” Ex. 7 at 58:25-59:8.

2 Strike 3 also admitted that the allegation in paragraph 27 that John Doe downloaded
3 complete copies of the works was inaccurate. Instead, Strike 3 relies on bit field value evidence
4 of only “between 50 and 70 percent...” for each movie. *Id.* at 99:25-103:8. And while Strike 3
5 has been working with IPP to “figure out if there’s a way to get that full copy of the movie
6 from the subscriber,” IPP’s software currently cannot “download[] a hundred percent of the
7 movie from the subscriber.” *Id.*

8 Strike 3 made similar admissions in a recent deposition. In-house counsel Jessica
9 Fernandez admitted that Strike 3 does not know whether the subscriber is responsible for the
10 alleged infringement when it files their case and seeks early discovery. Ex. 4 at 190:25-192:17
11 (...“you’re asking me who the infringer is, it sounds like.... Oh, yeah, no. There’s – you know,
12 no.”). Ms. Fernandez also conceded that Strike 3 does not know whether the subscriber actually
13 downloaded full copies of the works until they have access to his or her computer. Ex. 4 at
14 187:18-189:2 (“I may not necessarily -- like, unless I have the defendant’s computer, I’m not
15 going to necessarily know that he has the entire work....”).

16 Neither admission is found in the submissions Strike 3 made to the Court in support of
17 their *ex parte* request for early discovery.

18 **D. Strike 3 has used this proceeding to investigate third parties other than John Doe.**

19 Strike 3 represented to the Court that it would use early discovery to investigate whether
20 Doe was responsible for alleged infringement. ECF 4. “With Defendant’s identity, Plaintiff will
21 be able to amend its Complaint to name Doe Defendant, and with said name and address, will
22 be able to serve a summons upon Defendant.” *Id.* at 15. But once Doe hired an attorney, Strike
23 3 abandoned any attempt to substitute Doe’s true name into the complaint. The back and forth
24 between the attorneys for Strike 3 and Doe is significant. Strike 3 asked Doe’s attorney to
25 disclose Doe’s identity in early 2008. Ex. 8 (Email Correspondence dated April 9, 2018). Doe’s
26 attorney agreed to provide Doe’s identity, in exchange for PCAP information. Ex. 9 (Email
27

1 Correspondence dated April 10, 2018). Strike 3 finally produced PCAPs, but not until 2019.
 2 McEntee Decl. ¶ 15.

3 Rather than use the process to investigate Doe and name him as a defendant, Strike has
 4 taken great pains to engage in a fishing expedition to determine who else could be responsible
 5 for infringement that Strike 3 initially pinned only on Doe. In Doe's deposition, for example,
 6 Strike 3 spent little time discussing Doe's internet habits, and instead asked pages of questions
 7 directed at determining which family members or friends could have infringed Strike 3's
 8 works. Ex. 10 (Doe Dep.) at 12:6-17, 41:9-42:2, 45:14-18, 51:23-52:15, 53:14-74:17. Similarly,
 9 Strike 3's counsel spent much of the deposition of Doe's son asking questions about the son's
 10 use of the internet, rather than Doe's use. Ex. 11 (Doe's Son Dep.) at 21:13-22:3, 46:2-48:13.
 11 Strike 3's tactics are contrary to the motion for early discovery, in which Strike 3 promised to
 12 investigate Doe alone.

13 **E. Strike 3's tactics have literally paid off.**

14 Settlements from litigation are a major revenue stream for Strike 3. Strike 3 has made
 15 [REDACTED] from their litigation campaign in less than two years. Ex. 5 (Confidential
 16 Fernandez Dep.) at 196:6-13. The company saw revenue of [REDACTED] in 2017, and close to
 17 that same amount the year prior. Ex. 12 (Lansky Dep.) at 195:11-197:9. Depending on timing,
 18 Strike 3's settlement revenue could account for up to a third of their gross revenue. If half of
 19 Strike 3's approximately 3,000 lawsuits result in settlement, the average settlement is [REDACTED]
 20 [REDACTED]. Strike 3's subscriptions are \$29.95 per month. *Id.* at 184:18-185:18.
 21 Assuming that Doe's alleged infringement displaces a paid subscription for one year
 22 (\$29.95/mo * 12 months = \$359.40), Strike 3's revenue from infringement cases far exceeds
 23 subscription revenue.

24 Strike 3 owner, Greg Lansky, has complained that piracy is a threat to his company.
 25 ECF 4-2 ¶ 22. If true, a rational businessman in Mr. Lansky's position would implement a
 26 system that would have the greatest impact on piracy at the lowest cost. For example, Strike 3
 27

1 could send DMCA notices directly to the ISP's, which costs very little. But by providing notice
 2 to the infringing IP address, Strike 3 has the potential to significantly decrease infringement.²
 3 Strike 3 also has the ability to implement watermarking. Watermarking would allow the
 4 company to draw on their subscribers to police the internet for piracy, a service Strike 3's
 5 subscribers already provide. ECF 81 ¶ 18; Ex. 12 at 131:7-132:2 ("a lot of our paying members
 6 take it upon themselves, because they're very loyal customers, to send out links, themselves,
 7 and be, like, look. I feel really bad. Your content is out there for free. You should take it
 8 down"). The notion that the company is struggling because of piracy is speculative, at best.

9 III. ADDITIONAL AUTHORITY AND ARGUMENT

10 A. Summary Judgment Standard

11 Summary judgment is appropriate only if no genuine dispute of material fact exists and
 12 the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). A fact is
 13 material if it might affect the outcome of the suit under the governing law. *Anderson v. Liberty*
 14 *Lobby, Inc.*, 477 U.S. 242, 248 (1986). The moving party must demonstrate the absence of a
 15 genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). In response,
 16 the adverse party must present affirmative evidence, which "is to be believed" from which all
 17 "justifiable inferences" are to be favorably drawn. *Anderson*, 477 U.S. at 255, 257. "[I]f a
 18 rational trier of fact might resolve the issue in favor of the nonmoving party, summary
 19 judgment must be denied. *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626,
 20 631 (9th Cir. 1987).

21 B. Abuse of Process

22 The following elements constitute abuse of process in Washington: (i) the existence of
 23 an ulterior purpose to accomplish an object not within the proper scope of the process, (ii) an

24
 25 ² Strike 3 hired Rightscorp for one week to send DMCA notices directly to the ISP, but
 26 stopped, claiming Rightscorp went out of business. Ex. 7 at 112:1-13. However, the company's
 27 web site suggests that its services are still available. See <https://www.rightscorp.com/> (last
 visited June 24, 2019).

1 act in the use of legal process not proper in the regular prosecution of the proceedings, and (iii)
 2 harm proximately caused by the abuse of process. *Bellevue Farm Owners Ass'n v. Stevens*, 198
 3 Wn. App. 464, 477, 394 P.3d 1018 (2017).

4 Federal Rule of Civil Procedure 11 requires pleadings to have evidentiary support. Fed.
 5 R. Civ. P. 11. While the rule addresses the Court's authority to police a party's representations,
 6 it is not the exclusive source for control of improper presentations of claims and "does not
 7 preclude a party from initiating an independent action for malicious prosecution or abuse of
 8 process." *See* Advisory Committee Notes (1993) to Fed. R. Civ. P. 11.

- 9 1. Strike 3 abused the process by failing to disclose they could not know whether it
 10 was Doe, or someone else, who was responsible for alleged infringement.

11 Strike 3 abused the process by failing to disclose two material facts that may have
 12 affected the Court's decision to grant early discovery.

13 First, Strike 3 failed to disclose that they could not know whether it was Doe, or
 14 someone else, who was responsible for alleged infringement, until Strike 3 obtained Doe's
 15 computer. Instead, Strike 3 misled the Court into believing that only Doe could be responsible
 16 for infringement, when Strike 3 affirmatively represented—as they have in literally thousands
 17 of other form complaints filed across the country—that Doe violated the Copyright Act when
 18 he "downloaded, copied, and distributed a complete copy of Plaintiff's Works without
 19 authorization." ECF 1 ¶ 27. Strike 3 then filed a motion based on these facts seeking the
 20 Court's permission to learn Doe's identity.

21 In his initial response, Doe listed several scenarios that explain why it is inaccurate to
 22 pin infringement on the subscriber of an IP address, including wireless home networks that
 23 support multiple users, whether or not they are password-protected, and Comcast's replacement
 24 of traditional customer routers with WiFi Hotspots. ECF 79 at 13. Strike 3 has since admitted
 25 that they cannot possibly know whether the subscriber infringed before discovery. Strike 3's
 26 corporate representative, Jessica Fernandez, testified that Strike 3 has no way of knowing
 27 whether the subscriber is actually responsible for alleged infringement unless and until Strike 3

1 inspects his computer. And Strike 3 conceded this fact again recently at a hearing in New
2 Jersey involving identical allegations.

3 Second, Strike 3 failed to disclose that the software IPP uses is not capable of
4 determining whether Doe downloaded entire works. Instead, Strike 3 misled the Court by
5 introducing a declaration from IPP employee Tobias Fieser that states unequivocally IPP
6 determined that the pieces Doe downloaded would result in a playable movie. *See* ECF 4-3 ¶ 9.
7 In his initial response, Doe introduced expert testimony that disproves Mr. Fieser's testimony.
8 ECF 79 at 15. Rather, the PCAPs that Strike 3 produced include only *de minimis* pieces
9 required to watch each movie. *Id.* Recently, Strike 3 admitted that IPP does not have the
10 capability of gathering enough pieces to compile an entire file.

11 Because Strike 3 could not possibly know whether Doe was the infringer, and knew that
12 they did not have evidence that the infringer associated with the IP address had downloaded a
13 complete movie, Strike 3 cannot credibly argue that they complied with Rule 11 by alleging the
14 exact opposite in the Complaint. And Strike 3's suggestion that these allegations were
15 supported by reasonable inferences is unsupportable. The Ninth Circuit held in *Cobbler Nevada*
16 that a reasonable inference based on an IP address alone is not enough. 901 F.3d at 1145.

17 Strike 3 has a different reading of *Cobbler Nevada*, which purports to eliminate Strike
18 3's Rule 11 obligations until Strike 3 learns John Doe's identity. Doe can find no support for
19 this position in the opinion. Regardless of when Strike 3's Rule 11 obligations begin or end, the
20 material omissions in their motion for early discovery form a basis for Doe's abuse of process
21 counterclaim. Because genuine issues of fact surround the material omissions in Strike 3's
22 motion for early discovery, summary judgment is inappropriate.

23 2. Strike 3 improperly used the discovery process to gather evidence regarding
24 potential infringers other than Doe.

25 A crucial inquiry is whether the judicial system's process, after having been made
26 available to secure the presence of the opposing party, has been misused to achieve another,
27 inappropriate end. *See Mark v. Williams*, 45 Wn. App. 182, 192, 724 P.2d 428 (1986). The

1 mere institution of a legal proceeding, even with a malicious motive, does not constitute an
 2 abuse of process. *Vargas Ramirez v. United States*, 93 F. Supp. 3d 1207, 1232 (W.D. Wash.
 3 2015). Even the filing of a baseless or vexatious lawsuit is not misusing the process, and no
 4 liability attaches if nothing is done with the litigation “other than carrying it to its regular
 5 conclusion.” *Batten v. Abrams*, 28 Wn. App. 737, 749, 626 P.2d 984 (1981).

6 While Doe does not believe Strike 3 had a Rule 11 basis to bring their Complaint, that
 7 decision does not form the basis of Doe’s counterclaim. Doe’s counterclaim is based on the
 8 material misrepresentations and/or omissions Strike made afterward. Strike 3 represented that
 9 the purpose of seeking early discovery was to identify Doe and amend the complaint to name
 10 him. Instead, Strike 3 has used the legal process to gather information about others who may
 11 have infringed. In doing so, Strike 3 engaged in an act, after using legal process, “to accomplish
 12 an end not within the purview of the suit.” *Vargas Ramirez*, 93 F. Supp. 3d at 1232; *see also*
 13 *Batten*, 28 Wn. App. at 748 (the tort “goes to use of the process once it has been issued for an
 14 end for which it was not designed”).

15 In addition to the “sue and settle” model Doe described in his initial response, Strike 3’s
 16 decision to target Doe’s son is precisely the type of coercive behavior that goes to the heart of
 17 abuse of process. *See Batten*, 28 Wn. App. at 746 (indicating that the requisite “improper
 18 purpose” for an abuse of process claim “usually takes the form of coercion to obtain a collateral
 19 advantage, not properly involved in the proceeding itself”).

20 3. Strike 3’s actions proximately caused Doe’s harm.

21 If the Court had known that Strike 3 had no confidence that Doe was the infringer, and
 22 that Strike 3’s investigator is incapable of ever establishing that Strike 3’s entire works had
 23 been downloaded, it is unlikely the Court would have concluded that Strike 3 had good cause to
 24 seek early discovery. Strike 3’s decision to seek *ex parte* discovery prompted Comcast to notify
 25 Doe he had been sued. Despite his innocence, Doe was force to hire an attorney to navigate
 26 Strike 3’s claim for copyright infringement. Strike 3’s material omissions proximately caused
 27

1 Doe to incur attorneys' fees and costs that he would not have otherwise incurred.

2 **C. Other federal district courts have refused to allow Strike 3 to engage in early**
 3 **discovery because Strike 3 does not know whether a defendant has infringed.**

4 In Doe's initial response, he cited to *Strike 3 Holdings, LLC v. Doe*, 351 F. Supp. 3d
 5 160, 164 (D.D.C. 2018), where Judge Lamberth denied Strike 3's request for early discovery,
 6 in part, because "Strike 3 fail[ed] to give the Court adequate confidence this defendant actually
 7 did the infringing."

8 Three months ago, Judge Orenstein in the Eastern District of New York similarly held
 9 that Strike 3 had not established good cause to subpoena the ISP associated with a Doe
 10 Defendant's IP address. *Strike 3 Holdings, LLC v. Doe*, No. 18CV0449ENVJO, 2019 WL
 11 2022452, at *4 (E.D.N.Y. Mar. 21, 2019). Judge Orenstein disputed Strike 3's claim that it
 12 intended to use the information obtained in early discovery actually litigate. *Id.* ("it is like that
 13 the one thing it will *not* do is use the information to litigate the action in court.") (emphasis in
 14 original).

15 Judge Orenstein further found "the fact that in more than a third of the resolved cases
 16 [in the Eastern District of New York], Strike 3 could not satisfy itself that the named defendant
 17 was actually the alleged infringer further undermines the proposition that good cause exists to
 18 allow expedited discovery." *Strike 3 Holdings, LLC*, 2019 WL 2022452, at *4. Although Judge
 19 Orenstein stopped short of concluding Strike 3 had violated Rule 11, he nonetheless found it
 20 "apparent that Strike 3 is deliberately asserting claims in a scattershot fashion against a broad
 21 array of individuals simply because it is confident that many of them will be liable – even if
 22 almost as many of them are not." *Id.* at *4. This practice, the court found, "seems wholly
 23 inconsistent with the [Rule 11] requirement that a plaintiff may not file a complaint for an
 24 improper purpose and that each of a plaintiff's claims must be predicated on a good faith belief
 25 in the claim's merit." *Id.*

26 Finally, the Court rejected Strike 3's argument that expedited discovery is necessary to
 27

deter copyright violations and enforce its copyrights. “To the contrary, attacking the problem by asking judges in hundreds of cases in just one district (and presumably thousands across the country) to consider the same motion and achieve a patchwork of results is plainly inefficient.” *Strike 3 Holdings, LLC*, 2019 WL 2022452, at *5 (citing Annemarie Bridy, Is Online Copyright Enforcement Scalable?, 13 Vand. J. Ent. & Tech. L. 695, 724 (2011) (“Simply put, litigation is not a scalable mechanism for dealing with the high volume of copyright disputes that arise from [peer-to-peer] file sharing.”)).

While other courts have approved Strike 3’s requests for early discovery, *see Strike 3 Holdings, LLC v. Doe*, 2019 WL 78987, at *4 (S.D.N.Y. Jan. 2, 2019) (citing cases), Judge Lamberth’s and Judge Orenstein’s opinions suggest a changing tide as additional courts learn about material omissions which directly contradict Strike 3’s representations, whether in support of early discovery or elsewhere in the legal process.

D. John Doe seeks a bench trial.

Strike 3 previously asked the Court to deny Doe’s jury demand. Doe’s initial response explained why his counterclaims could be properly tried before a jury. However, Doe has since made the decision to forgo a jury trial.

IV. CONCLUSION

Despite blatant and unequivocal allegations in their motion for early discovery that Doe is the infringer, and that full copies of Strike 3’s works were downloaded, Strike 3 knew that their investigator could never prove that Doe had downloaded entire films, and that they might not have the right defendant. Both of these facts are material to whether a court might find good cause for early discovery. Yet Strike 3 disclosed neither. Nor did Strike 3 disclose, contrary to their motion, that they intended to investigate third parties other than Doe. Strike 3’s conduct constitutes abuse of process. Based on the foregoing, and on Doe’s prior submissions in response to summary judgment, Doe respectfully request that the Court deny Strike 3’s motion.

1 RESPECTFULLY SUBMITTED AND DATED this 24th day of June, 2019.

2 TERRELL MARSHALL LAW GROUP PLLC

3
4 By: /s/ Adrienne D. McEntee, WSBA #34061

5 Beth E. Terrell, WSBA #26759

6 Email: bterrell@terrellmarshall.com

7 Adrienne D. McEntee, WSBA #34061

8 Email: amcentee@terrellmarshall.com

9 936 North 34th Street, Suite 300

10 Seattle, Washington 98103-8869

11 Telephone: (206) 816-6603

12 Facsimile: (206) 319-5450

13 J. Curtis Edmondson, WSBA #43795

14 Email: jcedmondson@edmolaw.com

15 EDMONDSON IP LAW

16 399 NE John Olsen Avenue

17 Hillsboro, Oregon 97124

18 Telephone: (503) 336-3749

19 *Attorneys for Defendant*

CERTIFICATE OF SERVICE

I, Adrienne D. McEntee, hereby certify that on June 24, 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Lincoln D. Bandlow, *Admitted Pro Hac Vice*
Email: lincoln@bandlowlaw.com
LAW OFFICES OF LINCOLN BANDLOW, P.C.
1801 Century Park East, Suite 2400
Los Angeles, California 90067
Telephone: (310) 556-9580
Facsimile: (310) 861-5550

John C. Atkin, *Admitted Pro Hac Vice*
Email: jatkin@atkinfirm.com
THE ATKIN FIRM, LLC
55 Madison Avenue, Suite 400
Morristown, New Jersey 07960
Telephone: (973) 285-3239

Jeremy E. Roller, WSBA #32021
Email: jroller@aretelaw.com
ARETE LAW GROUP PLLC
1218 Third Avenue, Suite 2100
Seattle, Washington 98101
Telephone: (206) 428-3250
Facsimile: (206) 428-3251

Attorneys for Plaintiff

Joshua L. Turnham, WSBA #49926
E-mail: joshua@turnhamlaw.com
THE LAW OFFICE OF JOSHUA L. TURNHAM PLLC
1001 4th Avenue, Suite 3200
Seattle, Washington 98154
Telephone: (206) 395-9267
Facsimile: (206) 905-2996

Attorneys for Non-Party John Doe's Son

1 F. Christopher Austin, *Admitted Pro Hac Vice*
Email: caustin@weidemiller.com
2 Allen Gregory Gibbs, *Admitted Pro Hac Vice*
Email: ggibbs@weidemiller.com
3 WEIDE & MILLER, LTD.
10655 Park Run Drive, Suite 100
4 Las Vegas, Nevada 89144
Telephone: (702) 382-4804
5

6 Derek A. Newman, WSBA #26967
Email: dn@newmanlaw.com
7 Rachel Horvitz, WSBA #52987
Email: rachel@newmanlaw.com
8 NEWMAN DU WORS LLP
2101 4th Avenue, Suite 1500
9 Seattle, Washington 98121
Telephone: (206) 274-2800
10 Facsimile: (206) 274-2801
11

12 *Attorneys for Attorneys for Third-Party Witnesses Tobias Fieser, IPP*
13 *International UG, Bunting Digital Forensics, LLC, Stephen M. Bunting*

14 DATED this 24th day of June, 2019.

15 TERRELL MARSHALL LAW GROUP PLLC

16
17 By: /s/ Adrienne D. McEntee, WSBA #34061
Adrienne D. McEntee, WSBA 34061
18 Email: amcentee@terrellmarshall.com
936 North 34th Street, Suite 300
19 Seattle, Washington 98103-8869
Telephone: (206) 816-6603
20 Facsimile: (206) 319-5450

21 *Attorneys for Defendant*
22
23
24
25
26
27

EXHIBIT B

US. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

STRIKE 3 HOLDINGS, LLC, A)	
DELAWARE CORPORATION,)	
)	
PLAINTIFF,)	
)	
VS.)	CASE NO.
)	2:17-CV-01731TZS
)	
JOHN DOE SUBSCRIBER ASSIGNED IP)	
ADDRESS 73.225.38.130,)	
DEFENDANT.)	
_____)	
)	
JOHN DOE, SUBSCRIBER ASSIGNED IP)	
ADDRESS 73.225.38.130,)	
)	
COUNTERCLAIMANT,)	
)	
VS.)	
)	
STRIKE 3 HOLDINGS, LLC,)	
)	
COUNTERDEFENDANT.)	
_____)	

C O N F I D E N T I A L

DEPOSITION OF JESSICA FERNANDEZ, taken on behalf
of the Counterclaimant, at 35 Hugus Alley, Pasadena,
California, commencing at 10:08 a.m, Friday, April 12, 2019,
before Sandra Mitchell, C.S.R. 12553, pursuant to Notice.

1 (CONFIDENTIAL TESTIMONY PER THE PROTECTIVE ORDER)

2 THE WITNESS: What's aggregate?

3 BY MR. EDMONDSON:

4 Q Total.

5 A Oh, yes.

6 Q Oh, okay. What is that total amount?

7 A It's -- so aggregate meaning total, meaning
8 there's no expenses removed from that, it would be --

9 THE WITNESS: And this is designated
10 confiden- --

11 MR. BANDLOW: This is confidential.

12 THE WITNESS: That would be around [REDACTED].

13 BY MR. EDMONDSON:

14 Q Okay. And what is the expenses associated with
15 that amount?

16 A Well, I don't know what the expenses are, but I
17 know that -- at least I don't have the number in my
18 head. But I know that if you deduct all of the expenses
19 in total from that [REDACTED], it's approximately
20 [REDACTED].

21 Q Okay.

22 A And so that average out over the course of
23 litigation, it's been going on for, like, 20 months, it
24 would be around [REDACTED].

25 Q And is one of --

EXHIBIT C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

STRIKE 3 HOLDINGS. LLC, a)	
Delaware corporation,)	
)	
Plaintiff,)	
)	
vs.)	CASE: 2:17-cv-01731-TSZ
)	
JOHN DOE, subscriber)	
assigned IP address)	
73.225.38.130,)	
)	
Defendants.)	
_____)	

VIDEOTAPED DEPOSITION OF GREG LANSKY,
taken on behalf of the Defendant, at Cotman IP Law Group,
PLC, One Colorado, 35 Hugus Alley, Suite 210, Pasadena,
California 91103, commencing at 10:06 a.m. and being
terminated at 3:17 p.m., on Thursday, April 11, 2019,
reported by JEANNETTE CORREIA, CSR No. 10994, a Certified
Shorthand Reporter in and for the State of California.

12:04:06 1 A Right.

2 Q -- you've hired X-Take- -- Takedowns to send
3 out DMCA notices on behalf of the company; is that --

4 A Yes.

12:04:13 5 Q -- right?

6 A Yes.

7 Q Okay. How does XTakedowns know who to send
8 the notices to?

9 MR. BANDLOW: Calls for speculation.

12:04:20 10 But if you know.

11 THE WITNESS: I -- I think it's -- it's -- I
12 think it's a mix of several different various ways.

13 BY MS. MCENTEE:

14 Q What are the various ways?

12:04:29 15 A Could be someone from our team reporting an
16 infringement online. It could actually be a lot of our
17 paying members take it upon themselves, because they're
18 very loyal customers, to send out links, themselves, and
19 be, like, look. I feel really bad. Your content is out
12:04:46 20 there for free. You should take it down. And then that
21 notice then will forwarded. Actually, a lot of our
22 paying customers, to support us, will -- will then --
23 will then help us out and give us links, and also
24 X-Takedown, themselves, take on the initiatives to -- to
12:04:58 25 find, you know, and try to -- try to -- try to find as

12:05:02 1 much infringement as possible. It's a never -- yeah.

2 It's --

3 Q And I think we're at the end of the tape.

4 So --

12:05:11 5 A Okay.

6 MS. McENTEE: Let's go off the record for a
7 minute.

8 THE VIDEOGRAPHER: This marks the end of Media
9 No. 1 in the deposition of Greg Lansky.

12:05:18 10 We are going off the record at 12:05 p.m.

11 (Off the record from 12:05 p.m. - 12:22 p.m.)

12 THE VIDEOGRAPHER: We are back on the record at
13 12:22 p.m., and this marks the beginning of Media
14 No. 2 in the deposition of Greg Lansky.

12:23:06 15 Please continue.

16 BY MS. McENTEE:

17 Q Mr. Lansky, Exhibit 40.

18 A Sorry. Yeah.

19 Q That's okay.

12:23:13 20 So, again, this is one of declarations that --
21 that you said you signed --

22 A Uh-huh.

23 Q -- in support of one of the copyright cases.
24 Did you actually type up this declaration?

12:23:25 25 A Yes.

02:16:13 1 have currently? And I say "Strike 3," but I think -- if
2 I sa- -- if I use the word "company," will you know that
3 I either mean General Media Systems or Strike 3?

4 A Sure.

02:16:27 5 Q Is that okay if I use that term?

6 A Sure.

7 Q Okay. How many subscribers does the company
8 have?

9 A It -- it -- that number really varies. I --
02:16:35 10 I don't know the exact number right now.

11 Q The last time you checked, how many
12 subscribers did the company have?

13 A There were probably little bit -- around
14 [REDACTED]. Maybe a little bit less.

02:16:50 15 Q Okay. And the subscriptions, are they
16 monthly subscriptions?

17 A Yes.

18 Q Are there any other types of subscriptions
19 other than monthly subscriptions?

02:17:05 20 A No.

21 Q And how much would a subscriber pay for a
22 subscription?

23 A It varies on the brands.

24 Q Okay. So for Vixen?

02:17:15 25 A 29.95.

02:17:17 1 Q A month?

2 A Yes.

3 Q What about for Blacked?

4 A 29.95 but occasionally the price will go

02:17:25 5 down during promos.

6 Q Okay. And what about Tushy?

7 A 29.95 and occasionally the price could go

8 down during promo.

9 Q And what about Blacked Raw?

02:17:36 10 A 29.95 but the price could fluctuates during
11 promo as well.

12 Q So is Vixen the only -- the only brand where
13 the price doesn't usually fluctuate?

14 A Sometimes it does, actually. It just -- it
02:17:47 15 just varies.

16 Q Sort of across the board the status quo is
17 29.95?

18 A When we're not in a promo, yes.

19 Q Okay. How often does the company offer
02:17:56 20 promos?

21 A It varies from year to year. We've been --
22 we've been -- we've been trying to figure out the best
23 system so it really varies.

24 Q The revenue from the subscriptions, the
02:18:06 25 money that comes in from the sub- -- subscriptions, does

02:26:58 1 really a data that you could just take at --

2 Q Got it.

3 A -- face value.

4 Q So you know how many subscriptions there
02:27:04 5 are, and you know how to monetize that, but NATS doesn't
6 tell you what that ends up being in the company's
7 pocket?

8 A Again, yeah, there is several different
9 stages in which that particular revenue is going to go
02:27:16 10 through.

11 Q Okay. So understanding that you don't know
12 specifically what the revenue was from subscriptions
13 last year, what was the revenue overall?

14 A Over- -- overall?

02:27:27 15 Q Yeah. You said you know what the revenue
16 is. You just --

17 A Right.

18 Q -- don't know how to parcel it out for --

19 A Sure.

02:27:32 20 Q -- the subscriptions.
21 So what was the revenue?

22 A About [REDACTED] I think -- I want to say

23 [REDACTED] I think is the ex- -- exact number.

24 Q Okay. And that includes the sale of DVDs
02:27:45 25 as well?

02:27:46 1 A Yes. Includes everything.

2 Q Does it also include licensing fees?

3 A Yes.

4 Q Did you know what the revenue was for 2017?

02:27:57 5 A I don't remember, but I know it was less.

6 Q Okay. Was it [REDACTED] ?

7 A Yes.

8 Q Was it [REDACTED] ?

9 A Yes.

02:28:06 10 Q Do you think it was [REDACTED] ?

11 A I don't want to guess exact number --

12 Q Okay.

13 A -- but -- but it sounds about right.

14 Q For 2016, do you recall what the revenue

02:28:16 15 was?

16 A Not the exact number, no.

17 Q Do you think it was lower than 2017?

18 A Yes.

19 Q Okay. [REDACTED] ?

02:28:24 20 A Yes.

21 Q And same question for 2015 --

22 A Uh-huh.

23 Q -- do -- do you know what the revenue was

24 that first year?

02:28:31 25 A I don't know the exact number, no.

02:28:33 1 Q Was it less than 2016?

2 A Yes.

3 Q Do you think in your first year of -- of

4 business with the company you still made [REDACTED]

02:28:42 5 [REDACTED] ?

6 A What do you mean by [REDACTED] ? You

7 mean --

8 Q [REDACTED].

9 A I think so.

02:28:49 10 Q Okay. And so do you know -- so taking last

11 year, for example --

12 A Right.

13 Q -- do you know how much of that revenue was

14 attributable to DVD sales?

02:29:02 15 A Not really, no.

16 Q How do you -- so I know you use NATS to

17 track subscriptions.

18 A Right.

19 Q Do you have any other software that you use

02:29:10 20 to track DVD sales?

21 A We don't use a software to track DVD sales.

22 Q How do you track DVD sales?

23 A Through our distributor.

24 Q So you rely on the distributor to --

02:29:21 25 distributor to tell you how many DVDs were sold?